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No. _____

In The

Supreme Court of the United States

October Term, 1996

DONALD VAN ORT; HELEN VAN ORT,

Petitioners,

v.

ESTATE OF MICHAEL STANEWICH, deceased; ANNA L. PREVOST, as Special Administratrix of THE ESTATE OF MICHAEL STANEWICH; COUNTY OF SAN DIEGO; SAN DIEGO SHERIFF'S DEPARTMENT; AND DOES 1-20, INCLUSIVE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

What is required to establish that a municipal policy caused a violation of constitutional rights and when is a district court justified in overturning a jury's finding of causation in a § 1983 action?

II.

When is a municipal government liable for off-duty police officers' actions that result from information gained on-duty and from their being regarded as police officers?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Brown v. Bryan County, Oklahoma, 67 F.3d 1174 (5th Cir. 1995), *cert. granted*, 116 S. Ct. 1540 (1996)..... 8

City of Canton v. Harris, 489 U.S. 378 (1989)..... 9

Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989)..... 8

Martinez v. Colon, 54 F.3d 980 (1st Cir. 1995)..... 12

Mateyko v. Felix, 913 F.2d 744 (9th Cir. 1991)..... 9

Pitchell v. Cohen, 13 F.3d 545 (2d Cir. 1994)..... 12

Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994)..... 7

The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988)..... 9

Vang v. Xiong X Toyed, 944 F.2d 476 (9th Cir. 1991).... 11

West v. Atkins, 487 U.S. 42 (1988)..... 12

CONSTITUTIONAL PROVISIONS

U.S. Const., amend XIV..... 1

STATUTES

28 U.S.C. § 1254..... 1

42 U.S.C. § 1983.....2, 3, 4, 10

PETITION FOR WRIT OF CERTIORARI

The petitioners, Donald Van Ort and Helen Van Ort, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 6, 1996.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision overturning the jury's verdict and granting a decision in favor of the defendants as a matter of law. A copy of the court's decision is reported at 92 F.3d 831 (9th Cir. 1996) and is attached in the Appendix to the Petition at pp. 1-25.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed the judgment as a matter of law that had been granted the defendants in the United States District Court for the Southern District of California on August 6, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend XIV:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On July 3, 1991, Detective Michael Stanewich, an undercover narcotics agent employed by the County of San Diego used his status as a police officer to gain access to appellants' home and assaulted and literally tortured Donald Van Ort and his eighty-seven year old grandmother, Helen Van Ort. Detective Stanewich had a lengthy record of violent and abusive behavior while working as a police officer. 92 F.3d at 837. Based on an earlier search of the Van Orts' home, on May 30, 1991, Detective Stanewich knew that a safe contained large amounts of cash, coins, and jewelry. Detective Stanewich knew there were no drugs in the Van Ort home and thus, no arrests were made. (Reporter's Transcript, p. 608-609).

Later, on July 3, 1991, Detective Stanewich returned to the Van Ort home and in an effort to get them to open the safe, Detective Stanewich tortured the appellants by dousing Donald Van Ort with lighter fluid and threatening to light him on fire, beating him into unconsciousness, and threatening and torturing Helen Van Ort by puncturing the skin between her fingers with a hypodermic needle. (R.T., p. 632-640). Another police officer, Deputy Gary Steadman, responded to a radio call, entered the Van Ort home and killed Detective Stanewich.

Appellants Donald Van Ort and Helen Van Ort brought this action, pursuant to 42 U.S.C. § 1983 and several state law claims, to recover damages from the County of San Diego, and other defendants, for the injuries inflicted by the illegal and unconstitutional behavior of Detective Michael Stanewich.

After a three week trial, the jury returned a unanimous verdict in favor of the Van Orts. A Special Verdict was issued in which the jury found that "the County of San Diego had official policies that were not adequate in that they: failed to consider and review disciplinary actions at the time of transfer, assignment, or promotion; . . . failed to include a specific system for warning supervisors about officers with repetitive patterns of misconduct." (C.R. #263, at 2-3). The jury concluded that the County was "deliberately indifferent to the rights of the public" and that this "was the cause of the deprivation of the plaintiffs' rights protected by the Constitution or laws of the United States." (C.R. #263, at 3). The jury awarded $850,000 in damages – $600,000 to Donald Van Ort and $250,000 to Helen Van Ort. The jury said that the County

of San Diego was liable for 80 percent of this amount and Detective Michael Stanewich was liable for 20 percent.

On November 25, 1994, the trial court overturned the jury's verdict and granted the County of San Diego's motion for a judgment as a matter of law. (C.R. #288, at 9-10). The Ninth Circuit affirmed the district court on the ground that Stanewich's conduct was not under "color of law." Specifically, the Ninth Circuit held that the County's policy cannot be seen as the cause of the constitutional violations because the precise type of injuries were not foreseeable. 92 F.3d at 837. Additionally, the court ruled that because Stanewich was off-duty the County is not liable for the harms that he inflicted. *Id.* at 838-39.

The Ninth Circuit also affirmed the district court's conclusions that the county could not be sued in tort pursuant to California law for the negligent supervision of Stanewich. Additionally, the Ninth Circuit reversed the district court and ruled that the victims' failure to file a claim with Stanewich's estate before filing the action limited the recovery against the state to the extent of the insurance coverage. Petitioners do not seek Supreme Court review of these latter two issues.

REASONS FOR GRANTING THE WRIT

This case presents two questions of exceptional importance that have divided the United States Courts of Appeals and that warrant Supreme Court review. First, what must be proven to establish causation in a § 1983 suit involving municipal liability? More specifically,

when may a district court overturn a jury's finding that a government policy caused serious injuries and violations of constitutional rights? The jury in this case rendered a special verdict that the County of San Diego had shown deliberate indifference in training and supervising its police officers and that this caused enormous harms to be inflicted upon the Van Orts who were literally tortured by a police officer. The district court overturned the jury's verdict and issued a judgment as a matter of law. The Ninth Circuit affirmed, in part, on the ground that while it was foreseeable that this officer would commit serious violations of rights, the specific type of actions could not have been foreseen. This case thus poses the important question: what is required to prove causation? Must the precise type of harms inflicted be foreseeable to find liability? Most importantly, if a jury finds causation, under what circumstances may a district court overturn that decision?

Second, when is a local government liable when its policies cause harms inflicted by an off-duty police officer? The district court issued a judgment as a matter of law, in part, because the police officer was off-duty at the time he tortured and attempted to rob the Van Orts. The Ninth Circuit affirmed. Two significant questions are thus posed. If it is proven that a government policy caused violations of constitutional rights, does the status of the agent inflicting the harms matter? Alternatively, is a government liable when one of its officers, albeit off-duty, inflicts harms that were possible only because of his or her government employment?

These issues are important because of the frequency with which they arise. They also are significant in terms

of the ability of injured individuals to recover for serious violations of their federal constitutional rights caused by government policies. These are issues that have produced varying approaches among the circuits and thus warrant Supreme Court review.

> A. What is required to establish that a municipal policy caused a violation of constitutional rights and when is a district court justified in overturning a jury's finding of causation in a § 1983 action?

The Ninth Circuit affirmed the district court's ruling overturning the jury verdict on the ground that Detective Stanewich was not acting under color of law when he inflicted the harms. The Van Orts offer two alternative reasons why the harms were inflicted under color of law and the County should be liable. First, if the jury reasonably concluded that the County's policy caused the Van Orts' injuries, that is sufficient for County § 1983 liability regardless of whether Detective Stanewich was on-duty or off-duty. Second, indeed, Detective Stanewich was acting under color of law because he gained access to the premises because he was reasonably perceived to be a police officer and because he acted on the basis of information he had clearly gained in his employment as a police officer.

As to the first argument, the Ninth Circuit concluded the County's policy was not the proximate cause of the Van Ort's injuries. The panel declared:

> "The Van Orts have provided a detailed description of Stanewich's considerable disciplinary record. County citizens brought numerous complaints against Stanewich for use of excessive

> and improper force and unwarranted violence in arrest and detention. . . . These facts do not show, as a matter of law, that the County could have foreseen Stanewich's actions which would establish the necessary causal link between the County's policy and the Van Orts' injuries. *Stanewich's disciplinary record may have put his supervisors on alert that he could be violent and prone to use excessive, even illegal force when performing his duties. But the County could not reasonably have foreseen that Stanewich would become a free-lance criminal and attack the Van Orts as he did.* 92 F.3d at 837 (emphasis added).

There are several serious problems with this analysis. The Ninth Circuit's approach requires that the precise type of harms be foreseeable in order for plaintiffs to recover in a § 1983 action. Expert witnesses testified at trial that it was foreseeable that Stanewich would engage in serious abusive behavior in the future. Surely the requirement cannot be that it had to be foreseeable that Detective Stanewich would torture two innocent individuals with lighter fluid and beat them to get them to open their safe. It is enough that in light of Detective Stanewich's past record it was foreseeable that he likely would abuse his police authority and seriously violate the rights of individuals in the future.

The Ninth Circuit's approach is inconsistent with that used in other Circuits where such evidence of foreseeability has been deemed sufficient to meet the causation requirement. For example, in *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994), the court found that the causation requirement was met because the harms inflicted by a

police officer were the "natural and foreseeable consequences of [the] failure to investigate, or even address, the pervasive violent propensities of one of [the] officers." *Id.* at 800.

Indeed, the test for causation varies among the United States Courts of Appeals. The United States Court of Appeals for the First Circuit has said that to meet the causation element the acts or omissions of the supervisors must have "played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission." *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 569 (1st Cir. 1989). Similarly, the Fifth Circuit has found causation where a local government's deliberate indifference "directly caused" violations of constitutional rights. *Brown v. Bryan County, Oklahoma*, 67 F.3d 1174 (5th Cir. 1995), *cert. granted*, 116 S. Ct. 1540 (1996). Under these approaches, the Van Orts clearly would prevail because the County's deliberate indifference to Stanewich's long disciplinary record played a substantial part in "bringing about" the harms suffered by the Van Orts. The Van Orts proved and the jury found that the County's deliberate indifference in promoting and assigning Stanewich led directly to their injuries. The government should be liable when the government sets in motion a series of acts that it should know would cause others to inflict injury.

More importantly, the Ninth Circuit's decision ignores the fact that there was a special jury verdict on the issue of causation. The issue is thus whether a reasonable jury, considering all of the evidence in the light most

favorable to the Van Orts, could have come to its conclusion concerning causation? *See The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988); *Mateyko v. Felix*, 913 F.2d 744, 745 (9th Cir. 1991). Contrary to the Ninth Circuit's conclusion, there was ample evidence in the record that it was foreseeable that "Stanewich would become a free-lance criminal and attack the Van Orts as he did." 92 F.3d at 837. He previously had engaged in unauthorized surveillance of people's homes, and indeed, not long before these events he was transferred to a new post because of a series of unauthorized surveillances in violation of department rules. (R.T. at 65-74, 526, 891). His supervisor, Lt. Trevino, wrote a detailed memo outlining Stanewich's misconduct and acknowledging he was not trustworthy as a "maverick" officer and lacked "good common sense" in judgment. (R.T. at 65-74, 526, 891). This made it foreseeable that Stanewich was using information gained on the job to plan his own "free-lance" criminal activities. Moreover, his lengthy disciplinary record made his attack foreseeable and his own supervisor admitted the same in the May 30th disciplinary memo.

The Supreme Court has said that the issue is whether the municipal policy is the "moving force behind the constitutional violation." *City of Canton v. Harris*, 489 U.S. 370, 389 (1989). The jury reasonably could have found that the Van Orts' injuries would not have happened if the County had established a system for identifying officers with a pattern of complaints, or if the County allowed supervisors to consider disciplinary records in making assignments and transfers, or if the County had imposed proper discipline on Detective Stanewich.

Ultimately, the issue posed by this case is one that the Supreme Court has not yet faced and which has divided the United States Courts of Appeals: what is the appropriate standard of causation in § 1983 cases involving claims of municipal liability? The definition of causation recurs constantly in § 1983 litigation and warrants Supreme Court clarification.

B. When is a municipal government liable for off-duty police officers' actions that result from information gained on-duty and from their being regarded as police officers?

As explained above, the Van Orts maintain that even if Michael Stanewich was not personally acting under color of law, the County is liable because the jury found that its policy caused the violations of the Van Orts' constitutional rights. Alternatively, the Van Orts maintain that Stanewich was himself acting under color of law when he injured the Van Orts.

The Ninth Circuit concluded that Stanewich was not acting under color of law because he was off-duty. The panel concluded: "Stanewich in a matter of moments, made it clear that his actions were illicit. In short, Stanewich exerted no meaningful, physical control over Donald on the basis of his status as a law enforcement officer. Thus, Stanewich's acts were not under color of law." 92 F.3d at 839-40.

This case thus raises the important issue of when an off-duty police officer is acting under color of law. This, too, is an issue that often arises, that has produced differing approaches among the Circuits, and that has not yet been faced by the Supreme Court.

The problem with the Ninth Circuit's approach is that it too narrowly defines the circumstances under which an off-duty officer will be found to be under color of law. Michael Stanewich knew of the safe in the Van Orts home only because of his conduct as a police officer in conducting a search. Stanewich had been at the Van Orts' house on three prior occasions when he was unquestionably in the role of police officer. (R.T., pp. 603-49, 1309). When Stanewich came to the Van Orts' house on July 3, 1991, Donald Van Ort recognized him as a police officer and reasonably thought that Stanewich was there again in that capacity. (R.T., pp. 629-30). Stanewich gained access to the Van Orts' home based on this perception.

Indeed, the Ninth Circuit's opinion is inconsistent with an earlier Ninth Circuit ruling in *Vang v. Xiong X Toyed*, 944 F.2d 476 (9th Cir. 1991). In *Vang*, the Ninth Circuit found that the actions of an off-duty government employee were under color of law when he used knowledge gained from his job and the victims' perception of him as a government official to commit a series of rapes. Here, the harms resulted from Stanewich's knowledge gained during his earlier actions as a police officer and from Donald Van Ort's belief that Stanewich was again there as an officer.

The Ninth Circuit distinguished *Vang* by saying: "Unlike the circumstances in *Vang*, Stanewich did not use his authority to gain entry to the home or to induce Donald to open his front door." 92 F.3d at 839. Quite the contrary, it is only because of Stanewich's authority that he knew of the safe. It is only because of his authority that Donald Van Ort recognized Stanewich as a police

officer. It is only because of this authority that Stanewich gained access to the Van Orts' home.

Indeed, other Circuits have held that "whether an officer was on or off-duty when the challenged incident occurred" is not dispositive. *Pitchell v. Cohen*, 13 F.3d 545, 548 (2d Cir. 1994); *see also Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). Yet, the Ninth Circuit's approach made Stanewich's status totally dispositive. The Ninth Circuit ignored all of the ways in which Stanewich's actions were completely a product of the knowledge and authority he possessed by virtue of his status as a police officer.

The Supreme Court has said that "the traditional definition of acting under color of state law requires that the defendant. . . . have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (citations omitted). Michael Stanewich's conduct was made possible only because he was a police officer; otherwise, he never would have known of the safe in the Van Orts' home, never have made the repeat visits, and never have been let in the Van Orts' house on the morning of the attempted robbery and torture.

Thus, this case presents the opportunity for the Supreme Court to clarify the important question of when a local government is liable for the off-duty conduct of its police officers. A significant number of cases pose this issue and it is one about which the Courts of Appeals differ.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for a writ of certiorari to the Ninth Circuit.

Dated: November 4, 1996

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD VAN ORT; HELEN VAN ORT, *Plaintiffs-Appellants,* v. ESTATE OF MICHAEL STANEWICH, deceased; ANNA L. PREVOST, as Special Administratrix of the Estate of Michael Stanewich; COUNTY OF SAN DIEGO; SAN DIEGO COUNTY SHERIFF'S DEPARTMENT, *Defendants-Appellees.*	No. 94-56766 D.C. No. CV-92-00777-IEG
DONALD VAN ORT; HELEN VAN ORT, *Plaintiffs-Appellees,* v. ANNA L. PREVOST, as Special Administratrix of the Estate of Michael Stanewich; COUNTY OF SAN DIEGO COUNTY SHERIFF'S DEPARTMENT, *Defendants,* and ESTATE OF MICHAEL STANEWICH, deceased, *Defendant-Appellant.*	No. 95-55284 OPINION

Appeals from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted
February 8, 1996 – Pasadena, California

Filed: August 6, 1996

Before: J. Clifford Wallace and Thomas G. Nelson, Circuit Judges, and William D. Browning,* District Judge.

Opinion by Judge Wallace

COUNSEL

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Greg J. Ryan, Sparber, Ferguson, Naumann, Ponder & Ryan, San Diego, California, for defendant-appellee cross-appellant, Estate of Stanewich.

Ricky R. Sanchez, Deputy County Counsel, San Diego, California, for the defendant-appellee.

OPINION

WALLACE, Circuit Judge:

Donald Van Ort and his grandmother, Helen (the Van Orts), appeal from the district court's judgment reversing a jury verdict in their favor. The Van Orts also appeal

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* Honorable William D. Browning, United States District Judge, District of Arizona, sitting by designation.

from the district court's judgment against them on their state law negligence claims.

The Estate of Stanewich (Estate) joins in the Van Orts' appeal of the district court's rulings on the federal civil rights and state law negligence claims. It separately appeals from the district court's denial of its motion to limit the Van Orts' claims to the insurance policy coverage.

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for entry of an amended judgment.

I

San Diego County Sheriff's Deputy Michael Stanewich served as an area detective stationed at the San Diego Sheriff's Encinitas substation. His duties included undercover narcotics investigation.

On May 30, 1991, Stanewich and other officers conducted a narcotics search of the Van Orts' Encinitas residence. The officers found no contraband or illegal drugs, and the search resulted in no criminal prosecutions. During the course of the search, however, officers required Donald to open a safe which contained cash, jewelry, and coins.

Stanewich received permission to be off duty on the morning of July 3, when he returned to the Van Orts' home. The record gives two differing accounts as to what occurred. According to depositions submitted by the Van

Orts, Stanewich forcibly entered their home. The depositions state that Stanewich wore blue jeans, a mask over his face, and latex gloves. They also state that Stanewich did not display his badge and denied being a police officer.

At trial, however, Donald gave a somewhat different account. He testified that, in response to the doorbell, he opened his front door slightly and recognized Stanewich. In this account, there was another individual accompanying Stanewich. Only after Donald recognized him did Stanewich put on a nylon mask, point a gun at Donald, and put on dark glasses. Donald then shouted, "It's a robbery, Grandma."

Both accounts agree, however, that Stanewich then attacked and tortured the Van Orts. He bound Donald, placed a pillowcase over his head and doused him with lighter fluid. He threatened to set him on fire unless he was given the combination to the safe. Stanewich then dragged Helen from room to room and demanded from her the safe's combination. Donald's girlfriend was in a bedroom and, upon Stanewich's entry, escaped to a neighbor's house where a 911 call was placed.

The responding police officer entered the home, twice ordered the intruder to "freeze," and shot Stanewich when he failed to comply. The officer then unmasked Stanewich, immediately recognized him and exclaimed, "Mike!" Stanewich responded, "Yes, it's me, I'm wrong," and died.

The Van Orts brought suit against Stanewich's estate, the County of San Diego (County), the San Diego Sheriff's Department, and others, seeking damages for mental

and physical injuries pursuant to 42 U.S.C. § 1983 and several state laws. Before the August 1994, trial, the district court granted the County's motion for summary judgment on the Van Orts' federal and state claims for vicarious, respondeat superior liability. In reaching this conclusion, the district court found that Stanewich did not use his "authority as a peace officer . . . to commit his misdeeds" and that "[n]o reasonable jury could conclude, under the facts of this case, that Michael Stanewich's assault and attempted robbery of plaintiffs on July 3, 1991 was anything but a substantial departure from his duties for purely personal reasons." The district court allowed the claims for direct liability for both the federal civil rights and state negligence causes of action to proceed to trial.

On September 8, 1994, after the close of all evidence but before the case went to the jury, the district court rendered a judgment as a matter of law on the Van Orts' state law negligence claim against the County. The district court concluded that Stanewich's supervisors and the County did not owe a duty to the Van Orts for Stanewich's actions outside of his scope of employment. Relying on its prior conclusion that Stanewich did not act within the scope of his duty, the district court ruled that the County owed no duty to the Van Orts and, therefore, they could not maintain a suit against the County based on state negligence law.

The district court allowed the jury to decide the federal civil rights claim under a direct liability theory. In a special verdict, the jury found the County's official policies were deliberately indifferent and caused "the

deprivation of the plaintiffs' [constitutional] rights." The jury also found against the Estate.

After the verdict was returned, the County moved for judgment as a matter of law, which the district court granted. Declining to reconsider its finding that Stanewich was not acting under color of law, the district court examined the conditions under which a constitutional right exists to be free from harm inflicted by private actors. According to the district court, such a right exists where the government (1) abuses a "special relationship" it created with the plaintiff, which leads to injury inflicted by nongovernment actors; or (2) through affirmative conduct, places the plaintiff in danger. The district court concluded that neither of these conditions were met and, therefore, there was no "state liability for private-actor harm." It also ruled that the evidence did not support the jury findings of causality and deliberate indifference. The verdict against the Estate remained intact.

We review de novo the district court's judgment notwithstanding the verdict. *Bank of the West v. Valley Nat'l Bank of Ariz.*, 41 F.3d 471, 477 (9th Cir. 1994). A judgment reversing the jury's verdict as a matter of law is appropriate when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2163 (1994). We review de novo the district court's denial of the Estate's motion to limit the amount of recovery because the Estate's separate appeal is based on the Van Orts' failure to comply with the California probate statute, which presents a question of statutory law. *See Forest Conservation Council v. Rosboro*

Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995) (reviewing interpretation of statute de novo).

II

Our analysis of municipal liability under section 1983 begins, of course, with *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Concluding that a municipality can be a "person" under section 1983, this benchmark opinion held that if the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [then] the government as an entity is responsible under § 1983." *Id.* at 694. Based upon *City of Canton v. Harris*, 489 U.S. 378 (1989) (*Canton*), we have stated four conditions that must be satisfied in order to establish municipal liability for failing to act to preserve constitutional rights: "(1) that [the plaintiff] possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's constitutional right; and (4) that the policy is the 'moving force behind the constitutional violation.' " *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (*Oviatt*), *quoting Canton*, 489 U.S. at 389-91.

In *Canton*, the Supreme Court announced these requirements in the context of a negligent training claim. They have since been applied to negligent supervision and hiring claims, too. *See Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989) (negligent supervision); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.) (negligent hiring), *cert. denied*, 506 U.S. 824 (1992). We

apply the Canton analysis here to the Van Orts' claims of negligent training, supervision, and monitoring.

The district court concluded that the Van Orts failed to satisfy the first, third, and fourth requirements of *Oviatt*. We may affirm the district court's judgment notwithstanding the verdict if its conclusion on any one of the *Oviatt* requirements is correct.

The district court first held that because Stanewich did not act under color of law, he did not deprive the Van Orts of a constitutional right: they have a right to be free only from deprivations committed under color of state law, not those committed by private actors. The Van Orts assert that it is irrelevant whether Stanewich acted under color of state law. As long as the jury found that the County's policies and procedures (i.e. its failure to train, supervise, and monitor police officers properly) caused the Van Orts' injuries, then the Van Orts argue that they have established *Monell* liability.

This is a novel argument. Whether the actual individual who inflicted the injuries acted under color of state law is often a threshold question. Individuals do, indeed, have a right to be free from state violations of the constitutional guarantees to be secure in one's person and home, not to be deprived of life, liberty, or property without due process, and to be free from cruel and unusual punishment. Individuals, however, have no right to be free from the infliction of such harm by private actors. *See DeShaney v. Winnebago Cy. Dep't of Social Serv.*, 489 U.S. 189, 196 (1989) (*DeShaney*) (Fourteenth Amendment's "purpose was to protect the people from the State,

not to ensure that the State protected them from each other").

If a government officer does not act within his scope of employment or under color of state law, then that government officer acts as a private citizen. *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir.) (*Martinez*) ("acts of state officials in the ambit of their personal pursuits are not state action" (quotations omitted)), *cert. denied*, 116 S. Ct. 515 (1995); *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994) (off-duty police officer acted "as a private citizen, not as a state actor" when he did not act in accordance with police regulation or invoke the authority of the police department). The district court found that Stanewich did not act under color of law. Stanewich, therefore, acted as a private citizen in attacking the Van Orts.

Because Stanewich acted as a private citizen, the Van Orts had no constitutional right to be free from his deprivations of their constitutional rights. Generally, there is no constitutional right "to governmental aid [from private deprivations of constitutional rights] even where such aid may be necessary to secure life, liberty, or property." *DeShaney*, 489 U.S. at 196. Thus, the County owed no duty to the Van Orts to prevent Stanewich from attacking them in his private capacity.

Only under highly limited circumstances does the government have a duty to protect individuals from deprivations of constitutional rights by private individuals. *Id.* at 198; *see also Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994) ("the state does not violate an individual's due process rights by failing to protect him or her from the criminal actions of a private actor, absent

some special relationship between the individual and state actor giving rise to a duty to protect"). Usually, affirmative government acts, like incarceration of criminals and institutionalization of the mentally ill, create these circumstances. *DeShaney*, 489 U.S. at 198-200.

The Van Orts can point to no affirmative government act that created a government duty to protect them from harm. *See Wood v. Ostrander*, 879 F.2d 583, 588-90 (9th Cir. 1989) (plaintiff could sue government when state officer affirmatively placed her in dangerous situation), *cert. denied*, 498 U.S. 938 (1990); *see also L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (generally citizens may not sue state employees who fail to protect them from harm committed by private parties unless there is a special relationship between the plaintiff or the state places the plaintiff in danger), *cert. denied*, 508 U.S. 951 (1993). On appeal, the Van Orts concede as much, admitting that they are not "contending that this was a situation where the government had the duty to stop private actors from inflicting harms."

Instead, the Van Orts argue that there is a constitutional right to be free from constitutional deprivations by private actors when the state somehow "causes" the deprivations through inadequate hiring, training, or supervision. The Van Orts rely on *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (*Bateson*), for the proposition that the County is liable for the constitutional violations caused by its policies regardless of whether the final actor was acting under color of law. *See id.* at 1304.

Nearly a decade before we refined the liability issue in *Oviatt*, we carefully pointed out the possible interaction between the identification of state action and causation. *See Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355-56 & n.2 (9th Cir. 1981) (*Arnold*) (determination of proximate cause may be similar to determination of state action). This type of analysis may occur when the person actually causing the harm is a state actor. *Id.* at 1356. Thus, although state action and causation are separate concepts, *Oviatt*, 954 F.2d at 1474, elements of the causation analysis have been used in determining state action. *Arnold*, 637 F.2d at 1356. As the Van Orts frame the argument, they attempt to implicate the fourth part of the *Oviatt* test, causation, as well as the first part: whether Stanewich's actions were under color of law.

Bateson states: "The requisite *causal connection* can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Bateson*, 857 F.2d at 1304 (emphasis added), *quoting Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir. 1987). *Bateson* does not purport to establish a far-reaching constitutional right to freedom from constitutional violations committed by private actors. *Bateson* merely raises the question whether a municipality's policy can "cause" injury when a government employee clearly acts outside his scope of employment or does not act under color of law.

Negligent hiring or supervision is proscribed under Monell but such negligence, as in all *Monell* actions, must

be the proximate cause of the injuries suffered. Pointing to a municipal policy action or inaction as a "but-for" cause is not enough to prove a causal connection under *Monell*. Rather, the policy must be the proximate cause of the section 1983 injury. *See Mann v. City of Tucson, Dep't of Police*, 782 F.2d 790, 793 (9th Cir. 1986) (section 1983 requires "proximate cause"); *Arnold*, 637 F.2d at 1355 (requiring but-for and proximate cause for section 1983 suits).

Traditional tort law defines intervening causes that break the chain of proximate causation. *Prosser and Keeton on Torts* § 44, at 312 (5th ed. 1984). This analysis applies in section 1983 actions. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) ("An unforeseen and abnormal intervention . . . breaks the chain of causality, thus shielding the defendant from [section 1983] liability." (quotations omitted)); *Dodd v. City of Norwich*, 827 F.2d 1, 6 (2d Cir. 1987) (*Dodd*) (a "policy [is] a proximate cause . . . if [ ] intervening actions were within the scope of the original risk and therefore foreseeable" (quotations omitted)), *cert. denied*, 484 U.S. 1007 (1988). Applying these principles to this case, we must determine whether, as a matter of law, Stanewich's private actions were intervening causes which preclude any County liability for alleged negligent hiring or supervision. *See Springer v. Seaman*, 821 F.2d 871, 876-77 (1st Cir. 1987) (although "the question of proximate causation [in a section 1983 action] is sometimes for the court and sometimes for the jury," the court decides whether reasonable disagreement on the issue is tenable).

The Van Orts have provided a detailed description of Stanewich's considerable disciplinary record. County citizens brought numerous complaints against Stanewich for use of excessive and improper force and unwarranted violence in arrest and detention. At least three of these complaints, dating from 1985 to 1988, were sustained. In 1991, Stanewich also was caught engaging in unauthorized surveillances in violation of workplace rules. For this infraction, Stanewich received a reprimand from a superior, who wrote on May 30, 1991, only one month prior to the Van Ort beatings, "I am not confident that Deputy Stanewich possesses the level of sophistication in his judgement capabilities necessary to function in his [job duties]. . . . There is no room for mavericks or no compliance to the basic precept to sound judgment based on good common sense." Only one day before the beatings, Stanewich was formally transferred to the Sheriff's Street Narcotics Team so that he could be more closely supervised and monitored.

These facts do not show, as a matter of law, that the County could have foreseen Stanewich's actions, which would establish the necessary causal link between the County's policy and the Van Orts' injuries. Stanewich's disciplinary record may have put his supervisors on alert that he could be violent and prone to use excessive, even illegal, force while performing his duties. But the County could not reasonably have foreseen that Stanewich would become a free-lance criminal and attack the Van Orts as he did. *Cf. Martinez v. California*, 444 U.S. 277, 285 (1980) (parolee's murder of decedent five months after being granted parole was "too remote a consequence of the parole officers' action to hold them responsible under

[section 1983]"). His unforeseeable private acts broke the chain of proximate cause connecting the County's alleged negligence to the Van Orts' injuries. *See* Dodd, 827 F.2d at 6. Without proximate cause, there is no section 1983 liability. *Arnold*, 637 F.2d at 1355; *see also Bateson*, 857 F.2d at 1304 (requisite causal connection necessary to establish section 1983 liability).

Thus, whether we need to borrow elements of proximate cause analysis to determine the state action issue under Bateson is irrelevant. The Van Orts failed to prove causation.

III

We now turn to the Van Orts' alternate argument that there was evidence supporting the finding that Stanewich acted, or purported to act, under color of state law. The jury did not decide this question; rather, the district court made this finding.

The district court was not required to find that Stanewich acted under color of state law merely because he was a law enforcement officer. *Gibson v. City of Chicago*, 910 F.2d 1510, 1516 (7th Cir. 1990) ("[A]cts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way related to the performance of police duties." (citations omitted)). Only if Stanewich's actions were in some way related "to the performance of his official duties," *Martinez*, 54 F.3d at 986, could his acts be fairly said to be under color of state law.

It cannot be reasonably argued – nor do the Van Orts contend – that Stanewich acted pursuant to any government or police goal. *See Screws v. United States*, 325 U.S. 91, 111 (1945) (*Screws*) ("Acts of officers who undertake to perform their official duties are [under color of law] whether they hew to the line of their authority or overstep it." (plurality opinion)). We affirm the district court's determination that Stanewich acted neither within his scope of authority nor under pretense of law. *See Mark v. Borough of Harboro*, 51 F.3d 1137, 1150-51 (3d Cir.) (member of volunteer fire company not acting under color of state law when, acting as an arsonist, he set fires so that he could later put them out), *cert. denied*, 116 S. Ct. 165 (1995); *Martinez*, 54 F.3d at 988 (policeman who, during private harassment, unintentionally fired service revolver thereby maiming fellow officer was not acting under color of state law). As in *Mark*, Stanewich was "pursuing his own goals and was not in any way subject to control by [his public employer]." 51 F.3d at 1151.

Stanewich also might have been acting under color of law if he had purported to or pretended to act under color of law, even if his goals were private and outside the scope of authority. *Screws*, 325 U.S. at 111 ("[U]nder 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded."); *see also Bonsignore v. City of New York*, 683 F.2d 635, 639 (2d Cir. 1982) (acts committed by an on-duty, uniformed police officer are not under color of law if not "committed in the performance of any actual or pretended duty" (quotations omitted)). Similarly, Stanewich could have been acting under color of state law if the Van Orts had been injured during a meeting "related

to the provision of services pursuant to [Stanewich's County] employment," and if Stanewich had used his "government position to exert influence and physical control" over the Van Orts, particularly if they were "in awe of government officials." *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480 (9th Cir. 1991). Relying on *Vang*, the Van Orts contend that Stanewich used his status and privileges as a law enforcement officer to gain entry to their home and to commit his crime.

The factual record before us is not altogether clear. In entering its September 23, 1993, summary judgment, the district court ruled that the County was not vicariously liable for the Van Orts' injuries. After a close reading of the depositions of Donald, Helen, and Donald's girlfriend, the court stated that Stanewich was not on duty and that

> [I]t is undisputed that at the time of his forced entry into the Van Ort residence on July 3, 1991, Stanewich was attired not in a uniform but in blue jeans and wore a mask, sunglasses and cap in an attempt to conceal his identity. He also wore a pair of rubber gloves. He did not display a badge to plaintiffs and denied being a police officer. Finally, it cannot reasonably be disputed that the purpose of Stanewich's visit to the Van Ort residence on that occasion was to rob and assault plaintiffs and had nothing to do with official police business.

Further, the court observed that "a close examination of Donald Van Ort's deposition transcript reveals that the door was open, and thus access was obtained, *prior to* Van Ort's recognition of Stanewich."

At trial, Donald gave a different account. He stated that he opened the door, peeked out, and saw and recognized Stanewich. He further stated that

> as I opened the door a little further, about to find out what he wants today, and he turns around very quickly, he pulls down a nylon mask over his head and points a gun at me, and he's fumbling with some dark glasses at the same time, some real dark glasses.
>
> And at that time, I realized that this isn't a normal visit by Michael Stanewich, he's doing his, he's trying to rob me . . . he comes through the threshold and pushes me . . . I shout to my grandmother, "it's a robbery, grandma."

Based on the trial evidence, the Van Orts argued that Stanewich "acted as a police officer," apparently because he carried handcuffs and a gun. For this reason, and because Stanewich "was perceived as acting as a police officer," and allowed to enter due to that perception, the Van Orts contend that Stanewich acted under color of law.

The question whether Stanewich acted under color of state law – or for that matter the factual questions surrounding Stanewich's entry into the Van Orts' home – were not submitted to a jury. All we have is the September 1993 order. The Van Orts did not object to the order's conclusion. They asked for reconsideration only in their opposition to the County's motion for judgment as a matter of law after trial. The district court refused to reopen the issue.

We are not called upon, however, to resolve the minor discrepancies between the two accounts because,

as a matter of law, neither account sufficiently shows action under color of state law. The two accounts agree that Donald opened the door in response to the doorbell before he recognized Stanewich. At no point did Stanewich purport to be acting as a policeman. On the contrary, he did not show a badge, but forced himself in wearing a nylon mask and pointing a gun at Donald, who then shouted "it's a robbery."

The Van Orts' argument rests largely upon Donald's trial statement that he recognized Stanewich as a police officer, and the conjecture that this recognition somehow rendered his acts under color of state law. Merely because Donald recognized Stanewich, however, would not make the attack under color of law. For instance, in *Barna v. City of Perth Amboy*, 42 F.3d 809 (3d Cir. 1994), a police officer attacked an individual, who was his relation by marriage and, of course, therefore knew the officer personally. The officer used his service revolver and police-issued nightstick, *id.* at 813, yet the court held there was no action under color of state law. Merely because a police officer is recognized as an individual employed as a police officer does not alone transform private acts into acts under color of state law.

According to his trial testimony, Donald opened the door without knowing who was there. He then recognized Stanewich, who quickly put on a mask and pointed a revolver at him. Unlike the circumstances in *Vang*, Stanewich did not use his authority to gain entry to the home or to induce Donald to open his front door. Rather, Stanewich, while wearing his mask, used his gun and physical force to enter the house. As Donald's cry, "it's a

robbery" shows, Donald was not under any illusion concerning Stanewich's intentions.

At most, Donald could contend that his recognition of Stanewich as a police officer caused him to hesitate and "open[ ] the door a little further" to find out what Stanewich wanted. Donald thereby could argue that Stanewich exerted physical control using his official status, as in *Vang*. But *Vang* cannot reasonably apply in this circumstance of conjectural, momentary, and de minimis physical control. The evidence shows that Donald would have opened the door regardless of whether Stanewich was a police officer, and Stanewich did not rely on Donald's recognition to gain entry; his gun and brute physical violence proved quite sufficient. Moreover, Stanewich did not purport to act under state law. Quite to the contrary, Stanewich, in a matter of moments, made it clear that his actions were illicit. In short, Stanewich exerted no meaningful, physical control over Donald on the basis of his status as a law enforcement officer. Thus, Stanewich's acts were not under color of law.

IV

On September 8, 1994, before the case was submitted to the jury, the district court ruled against the Van Orts' as a matter of law on their state law negligence claims. The Van Orts also raise this issue on appeal.

In California, a governmental entity can only be sued in tort pursuant to an authorizing statute or enactment. *Lopez v. Southern Cal. Rapid Transit Dist.*, 710 P.2d 907, 909 n.2 (1985) (*Lopez*) ("all government tort liability must be based on statute," but "liability is deemed provided by

statute if a statute defines the tort in general terms" (quotations omitted)); *Searcy v. Hemet*, 177 Cal. App. 3d 792, 798 (Cal. Ct. App. 1986). According to a California statute, "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment. . . . " Cal. Gov't Code § 815.2(a). At least for vicarious liability, this section would eliminate the County's liability, as Stanewich was not acting within his scope of employment.

The Van Orts argue that there could be liability under that statute because the jury could have concluded that Stanewich acted within his scope of employment. The California law, however, is to the contrary.

> [A]n employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. Thus, if the employee inflicts an injury out of personal malice . . . or acts out of personal malice unconnected with the employment . . . the employee is not acting within the scope of employment.

Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 449 Cal. (1995) (citations and quotations omitted). The free-lance criminal exploits of a law enforcement officer fall within the California Supreme Court's language in *Farmers*.

The Van Orts also argue that section 815.2, along with California Government Code § 820(a) ("a public employee is liable for injury caused by his act or omission to the same extent as a private person"), leaves open the possibility that there is statutory authority for a negligent supervision or promotion suit. But the wording of the

statutes do not support the Van Orts' negligence claim. Section 815.2 provides for respondeat superior liability, and that avenue is closed to the Van Orts, as just discussed.

It can be argued that the statutory language conceivably provides for negligent supervision direct liability for acts employees committed within the scope of their employment. However, the language cannot support negligent supervision claims for actions outside Stanewich's scope of employment. Moreover, section 820 deals with defenses and immunities. It states only that if there is liability, a public employee is liable to the same extent as a private individual; it says nothing concerning the conditions under which public entity liability exists.

The case law is similarly unhelpful to the Van Orts. They cite *Grudt v. City of Los Angeles*, 468 P.2d 825, 826-27 (Cal. 1970), for the proposition that California recognizes a cause of action against public entities for negligent supervision. This is not so. *Grudt* states only that "[a]lthough no California authorities deal with the precise question at issue [whether a cause of action for negligent retention exists]," *id.* at 828, a plaintiff may amend his pleadings to allege such an [sic] cause of action. *Id.* at 829. Similarly, *Lopez*, which the Van Orts also cite, only stands for the proposition that public carriers, pursuant to California Civil Code § 2100, have a duty to protect passengers from assaults by other passengers. *Lopez*, 710 P.2d at 908. As part of this duty, the court mentioned in dicta that "[b]us drivers . . . could be trained to recognize and deal with potentially volatile situations." *Id.* at 911. There is nothing in Lopez which

sanctions negligent supervision causes of action against public entities.

The case most helpful to the Van Orts is *Virginia G. v. ABC Unified School Dist.*, 15 Cal. App. 4th 1848 (1993). There, the court held that while school districts cannot be held liable under respondeat superior for teachers who sexually molest students, "claims against school districts premised on their own direct negligence in hiring and supervising teachers may be pursued." *Id.* at 1855.

Virginia G. does not control here. First, the court limited its ruling to public schools and did not announce a general cause of action against all public entities for direct liability for their employees' misdeeds. Second, school districts have an affirmative duty to take all reasonable steps to protect their students. *Rodriguez v. Inglewood Unified School Dist.*, 186 Cal. App. 3d 707, 715 (Cal. App. 2d Dist. 1986). This includes protecting students against private actors, *Leger v. Stockton Unified School Dist.*, 202 Cal. App. 3d 1448, 1460-61 (Cal. App. 3d Dist. 1988). Similarly, the duty would extend to teachers acting outside of their scope of employment, who would become, in effect, private third parties. Thus, if certain hiring precautions should have reasonably been taken pursuant to this special duty, school districts can be liable.

Virginia G. is based upon and limited to the special relationship between a school district and its students. No similar special relationship exists between the County and the Van Orts. Unlike a school district's liability for a student's injuries, the County is not liable for harms committed by third parties or employees acting outside

their scope of employment. It need not take special precautions, including in their supervision and promotion, to protect private citizens. Thus, *Virginia G.* is distinguishable, and we conclude that a California state court would not extend liability to these facts. *See Thorn v. City of Glendale*, 28 Cal. App. 4th 1379, 1385 (Cal. App. 2d Dist. 1994) (interpreting *Virginia G.* as based upon the "special relationship" between school districts and their students and concluding that *Virginia G.* "reserved the issue of public entity immunity for negligent supervision").

V

Section 9351 of the California Probate Code states that "[a]n action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is first filed as provided in this part and the claim is rejected in whole or in part." At the time this suit was brought, the Van Orts had not filed a claim with the Estate. Filing a suit against an estate is not equivalent to filing a probate claim. *Wood v. Brown*, 114 Cal. Rptr. 63, 67 (Ct. App. 1974) (construing former California Probate Code § 709, which is an analogue to section 9351).

There is an exception to this sequence requirement. "An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced . . . without first filing a claim as provided in this part." Cal. Probate Code § 9390(a). However, if an action seeks damages exceeding the insurance coverage, it may not proceed "[u]nless a claim is first made as provided in

this part." Cal. Probate Code § 9390(b). Moreover, California Probate Code § 554 states that, as a general rule, damages sought against an estate are limited to insurance coverage unless the estate's personal representative is joined as a party, and the plaintiff filed a claim according to section 9390. Because the Van Orts never made a claim, the Estate argues that their recovery should be limited to the insurance coverage.

The general procedure outlined in California Probate Code § 9100 requires that a claim be filed "[f]our months after the date letters are first issued to a general personal representative." However, a general personal representative was never appointed. Thus, the Van Orts argue that the section 9100 deadlines are not applicable. Therefore, they argue that they never had an obligation to file a claim.

The Van Orts' interpretation would have some force, if it were not for section 9100(b), which states that "a reference in another statute to the time for filing a claim means [the four months standard] unless the provision or context requires otherwise." Here, the context of sections 554 and 9390 requires otherwise and trumps the requirements of section 9100.

The process for making a claim requires only that a claim be mailed to a "personal representative." Cal. Probate Code § 9251. Although the Estate has no general personal representative, there is a special administratrix. According to California Probate Code § 58, a "personal representative" includes a "special administratrix." Thus, there was someone with whom the claim could have been filed.

The district court relied on two cases, *Clark v. Kerby*, 6 Cal. Rptr. 2d 440 (Ct. App. 1st Dist. 1992), and *Burgos v. Tamulonis*, 28 Cal. App. 4th 757 (Ct. App. 4th Dist. 1994), for the proposition that California courts have allowed plaintiffs who did not file a probate claim before filing suit to remedy their error. In *Burgos*, a plaintiff made a claim against an individual who later died. The plaintiff never learned of the death until after the period for filing a claim with the estate had lapsed under the former California Civil Procedure Code § 375. The later filing was permitted. In *Clark*, the plaintiff, learning of the administration of defendant's estate too late, filed a claim after the section 9100 limitations. The case was remanded to determine whether there was a due process violation.

These cases speak generally about certain deadlines which are not directly relevant here and do not involve sections 544 and 9390 deadlines. Following the statute strictly, we hold that the Van Orts' failure to file a claim limits their recovery against the Estate to the extent of insurance coverage. Thus, this part of the district court's judgment must be reversed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ENTRY OF AN AMENDED JUDGMENT.

Supreme Court, U.S.
FILED
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No. 96-855

In The

Supreme Court of the United States

October Term, 1996

DONALD VAN ORT; HELEN VAN ORT,

Petitioners,

v.

ESTATE OF MICHAEL STANEWICH, deceased; ANNA L. PREVOST, as Special Administratrix of THE ESTATE OF MICHAEL STANEWICH; COUNTY OF SAN DIEGO; AND SAN DIEGO SHERIFF'S DEPARTMENT; AND DOES 1-20, INCLUSIVE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly decided that the off-duty criminal conduct of a person employed as a deputy sheriff does not give rise to municipal liability under 42 U.S.C. section 1983.

LIST OF PARTIES

Respondent is the County of San Diego, a public entity and a political subdivision of the State of California.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS TO DENY THE WRIT 4

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS OR WITH PRECEDENT OF THIS COURT 4

II. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW AND WAS FULLY CONSIDERED AND CORRECTLY DECIDED BELOW 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) 7

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) 6

Canton v. Harris, 489 U.S. 378 [103 L.Ed.2d 412] (1989) 6, 8, 10

Davis v. City of Ellensburg, 869 F.2d 1230 (9th Cir. 1989) 7

DeShaney v. Winnebago Soc. Serv., 489 U.S. 189 [103 L.Ed.2d 249] (1989) 5, 9

L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992) 5

Martinez v. California, 444 U.S. 277 [62 L.Ed.2d 481] (1980) 9

Monell v. Dept. of Social Services of New York, 436 U.S. 691 [56 L.Ed.2d 611] (1978) 6

Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993) 7

Oklahoma City of Tuttle, 471 U.S. 808 [85 L.Ed.2d 791] (1985) 8

Oviatt By and Through Waugh v. Pearce, 954 F.2d 1470 (9th Cir. 1992) 6

Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) 5

Rizzo v. Goode, 423 U.S. 362 [46 L.Ed.2d 561] (1976) 6

Screws v. United States, 325 U.S. 91 [89 L.Ed.2d 1495] (1945) 5

TABLE OF AUTHORITIES – Continued

Page

Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994)..... 7

Van Ort v. Estate of Michael Stanewich, 92 F.3d 831 (9th Cir. 1996)..... 3, 7, 8

Vang v. Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991) 4

West v. Atkins, 487 U.S. 42 [101 L.Ed.2d 40] (1988) 4

TO THE HONORABLE SUPREME COURT:

Defendant/respondent County of San Diego, a political subdivision of the State of California, submits this brief in opposition to the petition for a writ of certiorari submitted by plaintiffs/petitioners Donald Van Ort and Helen Van Ort.[1]

INTRODUCTION

Petitioners, Donald Van Ort and Helen Van Ort, have petitioned for review of the published decision of the Ninth Circuit Court of Appeals affirming the district court's judgment in favor of respondent. Respondent County of San Diego respectfully requests that the Van Orts' petition be denied. Petitioners fail to establish that the Court of Appeals' decision is in conflict with the decisions of other circuits or with precedent of this court or that this case presents an important question of federal law which requires review by this Court.

STATEMENT OF THE CASE

On July 3, 1991, Michael Stanewich ("Stanewich"), an off-duty San Diego County Sheriff's deputy, wearing civilian clothes, a mask and latex gloves, and brandishing a gun, forcibly entered the residence of Donald Van Ort and his grandmother, Helen Van Ort, to rob them. While

[1] The respondent does not contest the petitioners' statement of jurisdiction.

committing armed robbery, Stanewich was shot and fatally wounded by a uniformed deputy sheriff who went to the residence in response to an emergency call of a crime in progress.

About a month earlier, on May 30, 1991, Stanewich and other Sheriff's deputies searched the Van Orts' residence for narcotics pursuant to a Fourth Amendment waiver provision in Donald's parole order. During that search, Donald Van Ort opened a safe containing cash.

Stanewich was hired as a deputy sheriff on January 9, 1981, following a pre-employment background investigation. On September 21, 1990, he received a detective assignment. His duties included investigating narcotics violations.

During his 10-year service as a deputy sheriff, Stanewich had three department-generated complaints and nine citizen-generated complaints lodged against him. Only three of the citizen complaints were sustained. (Trial Exhibit 5 in Van Orts' Excerpts of the Record "V.O.E.R." Vol. II, Tab "T" 24-5 §§ 1 through 12; Supplemental Excerpts of the Record "S.E.R." 2 and 3 augment T24-5 §§ 6 and 8.) The last citizen complaint against him was lodged in 1988.

Prior to trial, the district court granted partial summary judgment, ruling that the County was not vicariously liable for Stanewich's robbery attempt because he was neither in the course and scope of employment nor acting under color of law.

After the close of all evidence, but before the case was submitted to the jury, the district court granted the

County judgment as a matter of law on the Van Orts' state law tort claim for negligent hiring. The Court of Appeals affirmed, and petitioners do not seek review of that decision.

The district court allowed the Van Orts' federal municipal civil rights claim against the County, brought under 42 U.S.C. section 1983 ("section 1983"), to go to the jury, which returned their verdict against the County.[2] In a special verdict, the jury found that the County had official policies that were inadequate in that they failed to consider and review disciplinary actions at the time of transfer, assignment, or promotion of officers; and failed to include a specific system for warning supervisors about officers with patterns of misconduct.

Following the jury's verdict, the County moved to set aside the verdict on the Van Orts' section 1983 claim. The district court granted the County's motion and the Van Orts appealed. The Court of Appeals affirmed, holding that there was no basis for imposing section 1983 liability because Stanewich's off-duty conduct was not state action under color of law; there was no affirmative government act that created any duty to protect the Van Orts from harm; and Stanewich's private actions as a freelance criminal were not reasonably foreseeable. *Van Ort v. Estate of Michael Stanewich*, 92 F.3d 831, 836-837 (9th Cir. 1996).

---

[2] The jury also found the Estate of Michael Stanewich liable on various tort theories.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS OR WITH PRECEDENT OF THIS COURT

Petitioners urge that their petition for writ of certiorari should be granted because there is a conflict between the circuits and within the Ninth Circuit Court of Appeals regarding what constitutes state action under color of law. Petitioners are mistaken.

Consistent with this Court's precedent, the Court of Appeals determined that Stanewich's conduct on July 3, 1991, was not "under color of state law" because he was not acting "in his official capacity or while exercising his responsibilities [as a deputy sheriff] pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 [101 L.Ed.2d 40] (1988).

Contrary to Petitioners' assertions, *Vang v. Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991), is not inconsistent with the Court of Appeals decision herein. Defendant Xiong was deemed to have acted under color of law because he used his employment status to get his clients to accompany him on car trips, during which he raped them. In the present matter, Stanewich forcibly entered the petitioners' residence to commit the robbery without the use of any indicia of police authority. His robbery attempt was in no way connected to his duties or responsibilities as a duty sheriff. Rather, Stanewich was engaged in a personal pursuit. (C.R. 111.) The only fact distinguishing this robbery from any ordinary armed robbery was that the robber was an off-duty deputy sheriff. This distinction is without consequence because acts of police officers in the ambit of their personal pursuits are excluded from

the term "color of law." *Screws v. United States*, 325 U.S. 91 [89 L.Ed.2d 1495] (1945).

The Court of Appeals decision which affirmed the district court's finding that Stanewich was a private actor when he attempted to rob petitioners is consistent with all applicable precedent. In so deciding, the Court of Appeals specifically recognized the principle enunciated by this Court in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 195 [103 L.Ed.2d 249] (1989), that constitutional liability does not generally extend to deprivations of life, liberty, or property caused by private actors. Referring to precedent from within and outside the Ninth Circuit, the Court of Appeals found that absent the existence of a special relationship between the individual and the government from which a duty to protect arises, or affirmative conduct by the government that places the individual in immediate peril, "members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties." *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992); see also *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993). Neither of these two special circumstances existed in this case.[3] Thus, the Court of Appeals, consistent with precedent, correctly decided that Stanewich's actions on July 3, 1993, were not under color of law. Petitioners cite no decision of a circuit court which is in conflict with the opinion of the Court of Appeals in this matter.

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[3] Petitioners suggest that because knowledge was imparted to Stanewich through his job, his later off-duty criminal conduct becomes conduct under color of law. No case has ever approved such a theory.

Petitioners next assert that this court should grant review because there is a conflict among the circuits regarding what must be proved to establish causation in a section 1983 case. Petitioners are incorrect. It is well settled that a municipality may not be held liable under section 1983 solely because it employs an individual later found to have deprived a citizen of constitutional rights. *Monell v. Dept. of Social Services of New York*, 436 U.S. 691 [56 L.Ed.2d 611] (1978). Only when a municipality's execution of an official policy or custom inflicts a constitutional injury may the government entity be liable under section 1983. *Id.*

The standard for causation in *Monell* liability cases, as expressed by this Court, is that the alleged deficient official policy or custom be "the moving force" behind the constitutional injury. *Canton v. Harris*, 489 U.S. 378, 389 [103 L.Ed.2d 412] (1989); *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). The municipal policy maker must have known or could be said to have reasonably known that the policy would set into motion a series of acts that would cause others to inflict the constitutional injury. *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988). The evidence must establish an affirmative link between the harm and the adoption of a plan or policy. The link must show the policy maker's authorization or approval of the resulting misconduct, *Rizzo v. Goode*, 423 U.S. 362, 371 [46 L.Ed.2d 561] (1976), thereby establishing that the policy was "closely related to the ultimate injury." *Canton v. Harris*, 489 U.S. at 391.

In this case, the Court of Appeals used the standard test of proximate cause in its analysis, which is consistent with this Court's precedent and the decisions of other

circuits. An official policy or custom is the proximate cause if the resultant constitutional injury is foreseeable. *Van Ort v. Estate of Stanewich*, 92 F.3d at 840. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994), which petitioners cite in urging review, held, consistent with the Court of Appeals decision in this case, that proximate cause is the standard for section 1983 liability. Petitioners cite no cases contrary to this accepted standard.

Petitioners sought to establish an official custom which caused their injuries, relying solely on the alleged disregard of Stanewich's disciplinary history. The purported custom was the County's alleged failure to consider and review disciplinary histories at the time of transfer, assignment, or promotion of officers; and failure to include a specific system for warning supervisors about officers with patterns of misconduct. The gist of petitioners' argument is that but for Stanewich's assignment to narcotics investigations, and the knowledge he gained about the petitioners from that assignment, he would never have met petitioners and attempted to rob them.

Although the Court of Appeals did not specifically decide whether any custom existed,[4] it did expressly

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[4] Because the trial evidence was confined to Stanewich's disciplinary history, it was insufficient as a matter of law to support a *Monell* claim based on a widespread official custom. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367-68 (9th Cir. 1994); *Cf. Montiel v. City of Los Angeles*, 2 F.3d 335, 342-343 (9th Cir. 1993) [mishandling of the plaintiff's own citizen complaint would not establish that the city had a "policy or practice . . . of deliberate indifference to police brutality."]; *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989)

reject petitioners' "but for" causation argument, which type of argument has been consistently recognized as insufficient for causation in a section 1983 case. *Van Ort v. Estate of Stanewich,* 92 F.3d at 840. Chief Justice Rehnquist, in *Oklahoma City v. Tuttle,* 471 U.S. 808 [85 L.Ed.2d 791] (1985), explained the fallacy of the Van Orts' contention:

> "Obviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel [the police officer] would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force." (*Id.* at 823.)

In *Canton v. Harris,* 489 U.S. 378, this court reiterated that it is insufficient merely to suggest in hindsight that, if some different policy existed, the unfortunate event might have been prevented:

> "In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. (Citation omitted.) Thus, permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities – a result we rejected in *Monell* (citation omitted)." (*Id.* at 392.)

(same standard applies to training and supervision); *Canton v. Harris,* 489 U.S. at 391.

None of the cases petitioners cite are contrary to the standard of causation correctly utilized by the Court of Appeals in this matter. There is no compelling reason for this court to review the Court of Appeals' decision.

II. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW AND WAS FULLY CONSIDERED AND CORRECTLY DECIDED BELOW

Petitioners assert that this case presents an important question of federal law by summarily concluding that the issues presented frequently arise and because persons injured by the off-duty conduct of government officials should receive compensation. Although the facts in this case are interesting, the case does not present a novel legal issue. Petitioners' contentions do not satisfy the requirement of Supreme Court Rule 10, that petitioners identify a compelling reason to justify granting of their petition for writ of certiorari.

The courts below correctly decided that the trial evidence did not satisfy the foreseeability requirement for causation, as a matter of law. The casual connection between the knowledge Stanewich obtained from his assignment to narcotics investigations and his robbery of the Van Orts is too attenuated and remote for any civil rights liability to arise therefrom. See e.g., *Martinez v. California*, 444 U.S. 277, 285 [62 L.Ed.2d 481] (1980); *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. at 197 n.4.

Stanewich's disciplinary record did not make foreseeable the violent and malicious acts he would commit against petitioners. During Stanewich's ten-year career, only three citizen-generated complaints against him were

sustained. None were materially similar to Stanewich's attempted armed robbery. (V.O.E.R., Vol. II, T24-5 §§ 11, 7, 9, 6; S.E.R. 2.) Contrary to petitioners' representation in their petition, Stanewich engaged in only one surveillance for which he was disciplined. Discipline was imposed because he conducted it without a partner, and had not received pre-approved overtime for the work. *Id.* The Court of Appeals correctly concluded that such procedural transgressions were insufficient to make a subsequent off-duty crime foreseeable.

No other San Diego County sheriff's deputy in history has ever committed such a crime on or off duty. (R.T. 8/10/94, 91:7-10.) This fact alone undercuts any kind of foreseeability theory, or argument that there was an obvious need for changed practices. See e.g., *Canton v. Harris*, 489 U.S. at 390.[5]

The expert testimony also provided no support for a finding that Stanewich's robbery attempt was foreseeable. Petitioners' police expert merely speculated: "Something was going to happen. I couldn't say that was going to happen but something negative was going to happen." (R.T. 8/10/94, 103:8-10.) Another stated:

> "I don't believe that they could have necessarily predicted that he was going to commit a robbery, but I think there was a long series of

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[5] For County policy makers to have been deliberately indifferent to the need for the Van Orts' prophylactic measures, one must be able to conclude from the evidence that they knew to a moral certainty that County deputy sheriffs will exploit on-the-job information for criminal purposes. (See e.g., *Canton v. Harris*, 489 U.S. at 390 fn. 10.)

> problems that could allow them to successfully predict that there was going to be some kind of escalating problems in the future, whether it be a robbery or something lesser or perhaps even greater." (R.T. Vol. IV, 8/12/94, 574:25-575:6.)

Two other experts testified that there was nothing in Stanewich's record to indicate that his supervisors should have known that he would commit a robbery. (R.T. Vol. XII, 2140:25-2141:3; Vol. XVI, 2363:14-2364:3.) Stanewich's off-duty criminal conduct was simply not foreseeable.

This case does not present an important question of federal law which requires review by this Court.

CONCLUSION

In asking this Court to grant their petition for writ of certiorari, petitioners do little more than repeat their version of the facts. Their petition does not state a basis upon which this Court should grant certiorari. Respondent County of San Diego respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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